RABIAH LIP & ORS

v.

BUKIT LENANG DEVELOPMENT SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZALEHA ZAHARI JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NOS: J-02-467-2003, J-02-709-2003 & J-02-802-2003]
26 DECEMBER 2007

CONTRACT: *Formation - Subject to contract - Sale and purchase agreement for land - Whether valid contract exists - receipts issued to purchasers upon payment of advance payments for purchase of land - Receipts containing statement that certain steps need be taken including survey and acceptance of an offer - Receipts referred to an offer by purchaser - No agreement concluded as it was still subject to contract*

EQUITY: *Property, equitable interest in - Proprietory estoppel - Claim of proprietory estoppel by squatters - Whether any representation made by registered proprietor to induce squatters to remain in occupation of lands - Whether any right to equitable relief*

LAND LAW: *Estoppel - Proprietory estoppel - Claim of proprietory estoppel by squatters - Houses constructed by squatters without any encouragement from registered proprietor of land - Whether extended occupation of land by squatters gives rise to any legitimate expectation - National Land Code, s. 206(3) - Whether s. 206(3) applicable - Whether squatters established an in personam equity (estoppel) creating a binding obligation coupled with a right to equitable relief*

LAND LAW: *Indefeasibility of title and interests - Fraud - Whether transfer of land was fraudulent - Nature of notice or knowledge which may be taken into account for purposes of assessing what constitutes good faith - Whether constructive fraud existed - Standard of proof of fraud beyond reasonable doubt - Whether title defeasible*

EVIDENCE: *Presumption - Adverse inference - Evidence Act 1950, s. 114(g) - Failure by plaintiff to produce a witness - Whether presumption of adverse inference to be invoked - Sufficient documentary evidence tendered by plaintiff to proof its case - Absence of any gap in plaintiff's evidence - Presumption of adverse inference not to be invoked*

The respondent/plaintiff (a developer) had purchased from Oakfield Enterprise Sdn Bhd (Oakfield) 407 individual lots of land (the '407 lots') without vacant possession and the full purchase price was settled. The respondent could only registered itself as owner of 401 lots as six of the appellants/ defendants had filed a private caveat in respect of the other six lots. The respondent then instituted an action against 291 individuals for vacant possession. The appellants had occupied the 407 lots around about 1986. They erected their homes on the lots without obtaining any permission from the State Authorities or the previous owner. The appellants claimed that they had respectively paid sums of monies as advance payment for purchase of the lands in question pursuant to purported oral agreement with a representative of Oakfield, one Jaginder Singh ('J. Singh'). Receipts had been issued for these payments. The appellants, *inter alia*, claimed: (a) that they had entered into valid and enforceable agreements with Oakfield for the purchase of the 407 lots in 1994 and the agreements bound the respondent; (b) that the acquired legal title of the respondent could be challenged on the grounds of fraud or misrepresentation pursuant to the provision of s. 340(2)(a) of the National Land Code ('NLC'); (c) that the respondent was not a bone fide purchaser for value on the basis that the respondent, must have had notice of the appellant's claim prior to purchasing the 407 lots from Oakfield; (d) that J. Singh should have been brought forth as a witness for the respondent and that the failure to do so should attract the application of s. 114(g) Evidence Act 1950. The six appellants who filed caveats claimed that they had acquired an equitable interest over the land according to s. 206(3) of the NLC. It was argued that proprietary estoppel should be invoked against the respondent. The learned trial judge held in favour of the respondent and granted the respondent vacant possession of the lands.

Held (dismissing the appeals with costs)
Per Heliliah Mohd Yusof JCA:

(1) The appellants had acted on the mistaken belief as to the intent of the receipts. Even if there was a general description in the receipt of an approximate size of the land to be purchased, the completion of a contract was predicated on certain steps being taken including survey and acceptance of an offer. The receipts referred to an offer by the purchaser. No agreements had been concluded as it was still subject to contract. (paras 31 & 33)

(2) The appellants had not controverted the evidence that the appellants started occupying the land as squatters and that the construction of the homes were not acts which were encouraged by Oakfield or the respondent. The extended occupation could not in the circumstances give rise to any legitimate expectation for it remained equally uncontroverted. (para 35)

(3) In relation to proprietary estoppel, the evidence did not indicate that there was any representation made by the respondent that could be said to have induced the appellants to remain on the lots. (para 37)

(4) The object of s. 206(3) is to preserve contractual rights. The appellants had not succeeded in asserting an *in personam* equity (estoppel) to create the formation of a binding obligation coupled with a right to equitable relief (specific performance) in their attempt to elevate the equity into an equitable interest culminating in a proprietary relief against the land. (paras 39 & 41)

(5) The existence of notice or knowledge may be taken into account for purposes of assessing what constitutes good faith. However the appellants were attempting to assimilate knowledge of their presence on the lots with some form of notice of their claim of a contract which remained in status as something *in personam*. The appellants failed to establish that the transfer to the respondent was fraudulent other than the fact that J. Singh himself may have in fact cheated the appellants. (paras 55, 56 & 60)

(6) The best available evidence should have been documents. In this case the court orders obtained and the numerous receipts militated against the existence of a *consensus ad idem*. In the absence of a gap in the plaintiff's case it was not a case where s. 114(g) should be invoked. (para 64)

(7) Even if what was suggested here was constructive fraud the appellants had failed to provide evidence beyond reasonable doubt which they were bound to do. The appellants had not succeeded in establishing the fraud or fraudulent misrepresentation to render the legal title of the respondent defeasible. (paras 65 & 66)

Bahasa Malaysia *Translation Of Headnotes*

Responden/plaintiff (pemaju) telah membeli 407 lot tanah persendirian ('407 lot tersebut') dari Oakfield Enterprise Sdn Bhd ('Oakfield') tanpa milikan kosong dan telah membayar harga belian sepenuhnya. Responden hanya berjaya mendaftarkan dirinya sebagai pemilik berdaftar ke atas 401 lot kerana enam dari defendan/perayu telah memfail kaveat persendirian terhadap enam lot yang selebihnya. Berikutnya, responden memulakan tindakan terhadap 291 orang persendirian untuk milikan kosong. Perayu-perayu mula menduduki 407 lot tersebut pada tahun 1986. Mereka mendirikan rumah mereka di atas lot-lot tersebut tanpa meminta kebenaran dari Pihakberkuasa Negeri ataupun pemilik terdahulu. Perayu-perayu mendakwa bahawa mereka telah membayar sejumlah wang tertentu sebagai bayaran pendahuluan bagi pembelian tanah-tanah berkenaan berdasarkan satu perjanjian lisan dengan seorang wakil Oakfield, seorang yang bernama Jaginder Singh ('J. Singh'). Resit-resit penerimaan telah dikeluarkan bagi pembayaran-pembayaran tersebut. Berdasarkan keadaan ini, perayu-perayu antara lain menuntut: (a) bahawa mereka telah memeterai perjanjian yang sah dengan Oakfield bagi pembelian 407 lot tersebut pada tahun 1994 di mana perjanjian-perjanjian tersebut telah mengikat responden; (b) bahawa kesahan hakmilik responden boleh dicabar atas alasan fraud atau misrepresentasi berasaskan s. 340(2) Kanun Tanah Negara ('KTN'); (c) bahawa responden bukan seorang pembeli *bona fide* dengan nilai memandangkan responden mempunyai notis mengenai tuntutan perayu-perayu sebelum membeli 407 lot tersebut dari Oakfield; (d) bahawa J. Singh sepatutnya dikemukakan sebagai seorang saksi dan kegagalan berbuat demikian harus menarik pemakaian s. 114(g) Akta Keterangan 1950. Keenam-enam perayu yang memfailkan kaveat mendakwa bahawa mereka telah memperoleh kepentingan berekuiti terhadap tanah berdasarkan s. 206(3) KTN 1965. Dihujahkan juga bahawa estopel kepemilikan harus dikenakan ke atas responden. Yang arif hakim bicara memutuskan dengan berpihak kepada responden sekaligus membenarkan milikan kosong tanah kepada responden.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Heliliah Mohd Yusof HMR:

(1) Perayu-perayu bertindak atas kepercayaan yang silap mengenai tujuan resit-resit dikeluarkan. Jikapun memang terdapat satu kenyataan umum pada resit mengenai keluasan tanah yang

akan dibeli, penyempurnaan kontrak adalah diasaskan kepada beberapa langkah-langkah tertentu yang perlu diambil, termasuk melakukan persempadanan dan penerimaan tawaran yang dibuat. Resit-resit merujuk kepada suatu tawaran oleh pembeli. Tiada perjanjian telah dimeterai kerana ia masih lagi tertakluk kepada kontrak.

(2) Perayu-perayu tidak menyangkal keterangan bahawa mereka mula menduduki tanah tersebut sebagai setinggan. Selain itu, pembinaan rumah-rumah mereka bukanlah perbuatan yang digalakkan oleh Oakfield ataupun responden. Pendudukan yang berterusan itu tidak boleh membangkitkan sebarang harapan yang sah.

(3) Berkaitan estopel kepemilikan, keterangan tidak menunjukkan bahawa terdapat apa-apa representasi yang dibuat oleh responden yang boleh dianggap sebagai mendorong atau menggalakkan perayu-perayu untuk terus tinggal di atas lot-lot.

(4) Objek s. 206(3) adalah untuk mengekalkan hak-hak berkontrak. Perayu-perayu, dalam usaha untuk mengangkat ekuiti menjadi satu kepentingan berekuiti yang berakhir dengan satu relif kepemilikan terhadap tanah, bagaimanapun gagal membuktikan ekuiti *in personam* (estopel) bagi membangkitkan satu obligasi mengikat yang disertai dengan satu hak terhadap relif berekuiti (pelaksanaan spesifik).

(5) Kewujudan notis atau pengetahuan boleh diambilkira bagi maksud menilai apakah yang membangkitkan niat yang jujur. Bagaimanapun, perayu-perayu cuba menyamakan pengetahuan mengenai kehadiran mereka di lot-lot dengan notis tuntutan mereka bahawa wujud satu kontrak yang statusnya kekal sebagai sesuatu yang berbentuk *in personam*. Selain dari fakta bahawa J. Singh sendiri mungkin telah menipu mereka, perayu-perayu gagal membuktikan bahawa pindahmilik kepada responden adalah atau telah dikotori oleh fraud.

(6) Keterangan terbaik adalah keterangan berbentuk dokumen. Dalam kes ini, perintah-perintah mahkamah yang diperolehi serta resit-resit yang begitu banyak telah menyangkal wujudnya suatu *konsensus ad idem*. Dalam ketiadaan lompang pada kes plaintif, maka ini bukanlah satu kes di mana s. 114(g) boleh dipakai atau dikenakan.

A **(7)** Jikapun apa yang dikatakan di sini adalah fraud konstruktif, perayu-perayu gagal mengemukakan bukti fradu tersebut di luar keraguan munasabah sepertimana yang menjadi tanggungjawab mereka. Perayu-perayu gagal membuktikan fraud atau misrepresentasi fraud bagi menggugat kesahan hakmilik
B responden.

Case(s) referred to:

Assets Co Ltd v. Mere Roihi & Ors [1905] AC 176 ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

C *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352* ***(refd)***

Crabb v. Arun District Council [1976] Ch 179 ***(refd)***

Damodaran v. Vesudeva [1974] 1 MLJ 128 ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ
D *(Rep) 48 HC* ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fon & Anor [1981] 1 MLJ 139 ***(refd)***

Kimlim Housing Development Sdn Bhd v. Bank Bumputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Lee Wai Fay & Anor v. Lee Seng Ein [2005] 3 CLJ 397 CA ***(refd)***

E *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449* ***(refd)***

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

F *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***

Ramsden v. Dyson [1866] LR 1 HL 129 ***(refd)***

Saminathan v. Pappa [1981] 1 MLJ 121 ***(refd)***

Smith v. Hughes [1870-71] 6 LR QB ***(refd)***

G *The Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commercial International Bank Ltd [1982] 10B 84* ***(refd)***

Waltons Stores (Interstate) Ltd v. Maher & Anor [1987-88] 76 ALR 513 ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 CA ***(refd)***

H **Legislation referred to:**

Evidence Act 1950, s. 114(g)

National Land Code, ss. 2, 206(1), (3), 340(2)(a), (e)

Rules of the High Court 1980, O. 89

For the appellants - Badrol Hisham Md Sani; M/s Zainal & Badrol
I *Gobind Singh Deo; M/s Karpal Singh & Co*
A Razak Ahmad; M/s Abdul Razak Ahmad & Assoc

For the respondent - YM Raja Aziz Addruse (Malik Imtiaz Sarwar, Mathew Thomas Philip & Sharmila Ravindran with him); M/s Thomas Philip

[Appeal from High Court, Johor; Suit No: 22-480-2000]

Reported by Amutha Suppayah

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] There were three civil appeals against the decision of the learned High Court Judge in Johor Bahru dated 28 April 2003. In that order the learned judge had made a ruling in favour of the respondent/plaintiff the effect of which was to grant the plaintiff vacant possession of certain lands. The grounds of judgement were not given. The defendants, the appellants in the three appeals were also injuncted from entering or occupying the said lands. A mandatory injunction was also granted for removal of structures that were constructed on the lands. The learned High Court Judge also dismissed the counter claim of the appellants/ defendants. All three appeals No. J-02-467-2003, J-02-802-2003, J-02-709-2003 were unanimously dismissed for the reasons stated hereinafter.

The Background

[2] The respondent/plaintiff a limited company as a developer had purchased from Oakfield Enterprise Sdn Bhd (or Oakfield) 407 individual lots held under Lot 83 Grant 72 Mukim Plentong, Daerah Johor Bharu identified as HS(D) 151079 PTD 64070 to HS(D) 151108 PTD 64099, HSD 151114 PTD 64105, HS(D) 151207 PTD 64198 to HS(D) 151332 PTD 64323, HS(D) 151334 PTD 64325, HS(D) 151351 PTD 64342 to HS(D) 151522 PTD 64513, HS(D) 151524 PTD 64515, HS(D) 151526 PTD 64517 to HS(D) 151601 PTD 64592 (hereinafter referred to as the "407 claimed lots"). The sale and purchase agreement dated 15 March 1996 (the agreement) was concluded between Oakfield and Beijing Shanyue Sdn Bhd, as the respondent was known before the change in name to Bukit Lenang Development Sdn Bhd.

[3] On 2 October 1996 the respondent/plaintiff was registered as the owner in respect of 401 out of the 407 claimed lots. The remaining six lots could not be registered in the respondent/

plaintiff's name as six of the appellants/defendants had filed a private caveat in respect of the six lots. The caveat was filed by the six appellants in civil appeal No. J-02-467-2003 on 12 September 1996.

[4] According to the respondent/plaintiff the 407 claimed lots were purchased without vacant possession at a price of RM32,577,452.31 and the full purchase price had been settled by 16 September 1996. While the plaintiff had instituted an action against two hundred and ninety one individuals there were three groups of defendants that had filed their defences separately.

[5] The appeals were heard together as there were specific issues which were common to all the three groups of appellants.

[6] It is a common ground generally stated by the appellants that around about 1986 the appellants had moved in and occupied the 407 claimed lots. Structures and shelters which served as their homes had also been erected on the 407 claimed lots without obtaining any permission from the State Authorities or any previous owner of the said lots. It is necessary to elaborate on the three groups of appellants which may be identified as follows:

(a) Group I – Appeal No. J-02-802-2003

This group of appellants/defendants apparently in 1991 (evidence of DW1) had appointed Tetuan Hadie Daris & Co. to act on their behalf towards the purchase of lands occupied by them. This group had paid RM2,500 to one Hj. Daris whom they believed had been entrusted by the occupants to handle the matters pertaining to the acquisition or purchase of the land. This group also rely on an oral agreement that was alleged to have been attained with a representative of Oakfield one Jaginder Singh (J. Singh). This group whose evidence was led by defendant No. 47 (or SD1/DW1) claimed that he and other appellants in this group are either equitable owners or occupants with licence.

This first group has also associated itself with the claim of the other two groups of appellants that some form of agreements had been arrived at with Oakfield in the course of negotiations with the said J. Singh.

(b) Group II – Appeal No. J-02-709-2003

The second group of appellants whose evidence was led by DW4 also alleged that other appellants like him had occupied the 407 claimed lots and erected buildings which they regard as their homes. Apparently sometime in 1993-1994 some discussion were undertaken with Tetuan J. Singh for the purchase of the land occupied by them with the amount of RM3,000 being paid as "pendahuluan".

DW2 admitted that no actual offer was made but DW2 believed that after payments were made a survey of the land would be effected after which a proper agreement would be drawn out. However after the payments were made there were no further developments. A receipt had been issued for each payment of RM3,000 made. DW2 was not able to indicate what he really knew about Oakfield or Tetuan J. Singh.

(c) Group III – Civil Appeal No. J-02-467-2003

The third group of appellants were the six persons who had filed private caveats. The evidence of DW7 which represents this group revealed that he is one of the occupiers of the 407 claimed lots. DW7 who had also paid RM3,000 filed a caveat on 12 September 1996 but had been waiting for Oakfield to conclude a written agreement like the other claimants who had received receipts for the payment of RM3,000 made. DW7 did not comprehend what was stated in an endorsement that was stamped on the reverse of the receipt. D3 the receipt was regarded as a receipt for an "initial deposit" or "pendahuluan 10% untuk membeli tanah sepertimana persetujuan yang dicapai." DW7 stated that the endorsement on the reverse of the receipt D3 was stamped in English and the receipt was not shown to anyone until it was disclosed to a lawyer. The receipt D3 was signed by J. Singh. It is to be noted that the several receipts issued, as exemplified by D3 that was issued to DW7, had the following words inscribed on the reverse:

> Deposit payment is received pursuant to application No. ... offer to purchase approximately 6,000 sq. ft. of land from Oakfield Enterprises Sdn. Bhd. in Plentong land formerly known as Lot 83 Grant 72. Payment received is subject to survey of the land and subject Oakfield thereafter accepting the offer to purchase.

The Issues

[7] While learned counsels for the three groups of appellants may have advanced specific arguments in emplacing varying emphasis on the issues nevertheless the issues that have been addressed are as follows:

(1) The appellants and Oakfield have entered into valid and enforceable agreements for the purchase of the 407 claimed lots in 1994 and the agreements bind the respondent. In conjunction with this issue six of the appellants who comprised one of the groups also asserted that they have acquired an equitable interest over the land according to s. 206(3) of the National Land Code 1965 (or NLC 1965). Hence the counter claim was made. This issue is also entwined with the argument that the concept of proprietary estoppel should be invoked and strictly construed against the respondent.

(2) The acquired legal title of the respondent was also challenged in that the appellants alleged that they have been able to establish a case of fraud or misrepresentation pursuant to the provision of s. 340(2)(a) of the NLC 1965. This issue is connected to the contention that the respondent is not a *bona fide* purchaser for value on the basis that the respondent, must have had notice of the appellant's claim prior to purchasing the 407 claimed lots from Oakfield.

The First Issue

[8] This issue evolves around a sale and purchase agreement purported to have been attained between the appellants and Oakfield.

[9] The relevance of the existence of a contract is also related to another contention of the appellants, that is, that they have acquired interests in the said lands. Bearing in mind that there are three groups of appellants, while the common argument has been that there was subsisting an agreement between Oakfield on the one hand and the appellants on the other, each group of appellants had also laid emphasis on the provisions of s. 340(2) of the National Land Code 1965 (NLC 1965). Additionally the group of six appellants who had filed caveats after the proceedings were instituted against them also claim that they have acquired an equitable interest over the land according to s. 206(3) of the NLC

1965. The concept of proprietary estoppel according to the appellants ought to be strictly construed against the respondent as the successor in title of Oakfield.

[10] It is evident that in relying upon the provision of s. 206(3) of the NLC 1965 the appellants are contending that while the underlying basis of their claim to continue to remain in physical occupation of the 407 claimed lots is contractual in nature, that claim has somewhat undergone a metamorphosis into what was termed as their "equitable interests". For this purpose there is a need to consider the provisions of s. 206(3) NLC 1965 which has to be read with s. 206(1).

[11] The relevant provisions states:

Section 206

(1) Subject to the following provisions of this section:

(a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

(b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, **until it has been registered under Part Eighteen.**

(2) ...

(3) Nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. (emphasis added)

[12] The word "dealing" is defined in s. 2 NLC 1965 as follows:

"dealing" means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

[13] A further note has to be made that the word "transaction" has not been defined. However under para. (b) of the aforesaid s. 206(1) it is necessary in the circumstances of this case to mention what is stated therein, that is, no instrument effecting any dealing shall operate to transfer the titles to any alienated land or to create or transfer any interest therein until it has been registered.

[14] The above is noted in view of the fact the respondent is already registered in respect of 401 of the 407 claimed lot with the exception of the six lots where caveats have been filed.

[15] In claiming the alleged equitable relief the three groups of appellants appeared to have adopted a dual or two pronged attack on the legal estate or title acquired by the respondent apart from the six lots which have not been registered.

[16] The first line of approach was to refer to the proprietary estoppel. The appellants under this line of argument are urging the court to intervene to do that which may be necessary to prevent "unconscionable conduct". The decision in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 has been cited.

[17] The appellants in seeking the equity of proprietary estoppel have endeavoured to establish a type of interest in land despite the absence of a formal contract with reliance being placed on an alleged representation and having acted on the alleged representation have consequently suffered a detriment. The representation is alleged to have emanated from the conduct of J. Singh whom it is said represents Oakfield. *Cheng Hang Guan*'s case (supra) contains passages in the judgement of Edgar Joseph Jr SCJ which has some bearings to the circumstances in the present appeal. The passage to be cited here is as follows at p. 405:

> Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving the property of another has no right to claim reimbursement or any proprietary interest in property. (See, eg *Ahmad Yar Khan v. Secretary of State for India in Council*.) Unlike promissory estoppel, proprietary estoppel, when it operates, is permanent in its effect and it is also capable of operating positively so as to give a cause of action. (See *Denny v. Jensen*.)
>
> In *Ramsden v. Dyson*, estoppel by representation was considered in relation to cases in which a person builds on the land of another, the landowner standing by without asserting his rights, In his dissenting judgment, which is still considered the locus classicus on the subject, Lord Kingsdown said this:
>
> > If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the

> faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

It was argued by counsel for the defendants on the authority of *Brinnard v. Ewens*, that for this sort of estoppel, four conditions have to be met:

(1) the claimant must have incurred expenditure or otherwise acted to his detriment;

(2) the claimants must have acted in the belief that they either owned or would obtain a sufficient interest in the property to justify the expenditure;

(3) the claimants' belief must have been encouraged by the landlord; and

(4) there must be no bar to the equity such as the contravention of any statute.

[18] And further on he stated (at p. 406):

> I regret that I cannot agree with the submission of counsel for the defendants that to establish proprietary estoppels, in cases where a person builds on or improves the land of another, the landowner standing by without asserting his rights while this was going on, it is essential to prove that such a person mistakenly thought that the land was his own when he did those acts, conducts as stopping him from subsequently asserting his title to the detriment of such person. I say so because even if such a person builds or improves the land of another knowing he was doing so on land belonging to another, there will still arise an equity in him if the landowner led such person to expect to be allowed to stay there. The case usually cited for this proposition is *Inwards v. Baker* at pp 36-37, where a father owned land and invited his son to build a bungalow on it. This was done partly at the son's expense, and the son lived in the bungalow. When the father died, the title to the land passed, under a will made before the land was bought or the bungalow built, to the father's mistress and other children.
>
> The Court of Appeal held that the son had a right to remain. Lord Denning MR, speaking for the court, said [at p 36]:
>
> > ... if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such

A as to entitle him to stay. He has a licence coupled with an equity ... even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is
B necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so ... I think that any purchaser who took with notice would clearly be bound by the equity.

C

Inwards v. Baker was a case of active encouragement since the father there had persuaded his son to build the bungalow on the father's land but an equity would also arise where the landowner merely encourage the builder's belief passively, as where the mortgagee stood silently by while a purchaser, in ignorance of the
D mortgage, built on the land. (See *AG of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd; Haslemere Estates Ltd v Baker*.) 'The circumstances of looking on is in many cases as strong as using terms of encouragement' (per Lord Eldon in *Dann v. Spurier*).

E I note that in both *Mok Deng Chee v. Yap See Hoi & Ors*, Salleh Abas FJ (as he then was), speaking for the Federal Court, and Choor Singh J in the Singapore case of *Khew Ah Bah v. Hong Ah Mye,* applied the principle in *Inwards v. Baker* although in neither case was there any question of mistake. And, in *Siew Soon Wah v. Yong Tong Hong*, Viscount Dilhorne quoted with approval the
F following passage in the judgment of Lord Denning in Inwards v Baker, 'All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of having been allowed to stay there'.

G Nor, for that matter, am I persuaded by counsel for the defendants that an independent consideration, for example, the payment of 'tea money' over and above the rent is an essential requirement for the operation of the doctrine of proprietary estoppel. The case to which I should like to refer here is *Crabb v. Arun District Council* at p 871 where Lord Denning, speaking
H for the Court of Appeal, said this:

Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights – **even though that promise may be unenforceable in point of law for want of consideration** or want of writing – and if he makes the
I promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise ... Short of an actual

> promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. (emphasis added).

Similarly, I am not persuaded that to raise an equity, it is essential that the representator must have knowledge that his property was being improved. The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights. I am supported in this by the following passage in the judgment of Oliver J in *Taylor Fashions Ltd v. Liverpool Victoria Trustees Co* at p. 915:

> Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

[19] The above passages have been reproduced to indicate the development of proprietary estoppel as applied not only in the United Kingdom but also the approach taken in Malaysia.

[20] The National Land Code 1965 is based on the Torrens Acts in Australia and hence certain decisions in Australia are worthy of mention where it is observed that there is really no difference between proprietary or promissory estoppel. This aspect has been dealt with in *Waltons Stores (Interstate) Ltd. v. Maher & Anor* [1987-88] 76 ALR 513. This Australian decision has made references to the English decision of *Crabb v. Arun District Council* [1976] Ch. 179 where Lord Denning MR observed "Equity comes in true form, to mitigate the rigours of strict law". The decision in *Crabb* together with *Ramsden v. Dyson* [1866] LR 1 HL 129 were all also referred to in the judgment in *Cheng Hang Guan*'s case

A cited by learned counsel for Group III of the appellants. The statements found in the judgments of Mason CJ and Wilson J in the Walton's case explain the following:

> ... The point is that generally speaking, a plaintiff cannot enforce
B a voluntary promise because the promise may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract.
>
> Crabb was an instance of promissory estoppel. It lends assistance to the view that promissory estoppel may in some circumstances
C extend to the enforcement of a right not previously in existence where the defendant has encouraged in the plaintiff the belief that it will be granted and has acquiesced in action taken by the plaintiff in that belief. There the defendants, knowing of the plaintiff's intention to sell his land in separate portions, encouraged the plaintiff to believe that he would be granted a right of access
D over their land and, by erecting gates and failing to disabuse him of his belief, encouraged the plaintiff to act to his detriment in selling part of the land without reservation of a right of way. This raised an equity in favour of the plaintiff which was satisfied by granting him a right of access and a right of way over the
E defendants' land. The Court of Appeal deduced from the circumstances an equity in the plaintiff to have these rights without having to pay for them. As Oliver J pointed out in *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 153, the Court of Appeal treated promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of
F the same general principle, a point also made by Lord Denning MR in Texas Bank, at 122, and seemingly accepted by the Privy Council in *Attorney-General of Hong Kong v. Humphreys Estate Ltd* [1987] 1 AC 114 at 123-4. In *Taylors Fashions* Oliver J also remarked (at 153) that what gave rise to the need for the court
G to intervene was the defendant's unconscionable attempt to go back on the assumptions which were the foundation of their dealings. Indeed, Scarman LJ in *Crabb* saw the question in terms of whether an equity had arisen from the conduct and relationship of the parties (at 193-4), concluding that the court should determine what was "the minimum equity to do justice to the
H plaintiff" (at 198); see also *Pascoe v. Turner* [1979] 1 WLR 431 at 438; [1979] 2 A11 ER 945 at 951.
>
> The decision in *Crabb* is consistent with the principle of proprietary estoppel applied in *Ramsden v. Dyson* [1866] LR 1 HL
I 129. Under that principle a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his

> detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances. And it should be noted that in *Crabb*, as in *Ramsden v. Dyson*, although equity acted by way of recognising a proprietary interest in the plaintiff, that proprietary interest came into existence as the only appropriate means by which the defendants could be effectively estopped from exercising their existing legal rights.
>
> One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J in *Grundt*, at 675; see also *Thompson*, at 547. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.

[21] In the present appeal it is noteworthy that the situation of the appellants differ from the occupants who had claimed the land from the defendants in *Cheng Hang Guan*'s case *(supra)* in that in the latter instance there were charged rentals and there were vegetable plots let to one Chong Au Pit the grandfather of one of the plaintiffs. The plaintiffs' family in that case had been staying on for a period that was found to be nearly 100 years. In the present appeal the appellants had moved in about 1986. There was no indication that they were tenants who had been paying rentals to any party. The respondent maintains that the appellants are trespassers.

[22] The issue here pivots on the question whether an agreement was in fact concluded for the sale and purchase of the 407 claimed lots. As observed by Blackburn J in *Smith v. Hughes* [1870-71] 6 LR QB, p. 607:

> I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other.
>
> The rule of law is that stated in *Freeman v. Cooke* (1). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the

A terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

B In *Cambridge Nutrition Ltd. v. BBC* [1990] 3 All ER 523, 542 Ralph Gibson LJ said "A contract is proved if the court finds that words were said which, properly construed in the context in which they were used, would be understood by a reasonable man or woman as the exchange of contractual promises. The making of a contract does not turn on the unstated intention or C understandings of a party.

[23] In order to ascertain whether there was a concluded agreement the evidence that have been adduced by the three groups of appellants, though in varying terms, have materially referred to the fact of lengthy occupation of the 407 claimed lots D and their claim that their presence there was well known both by Oakfield and by the respondent.

[24] Groups I, II & III of the appellants had individual witnesses respectively. However the appellants relied upon the evidence of E DW5 claimed by them as the independent witness. In evidence DW5 had stated that in 1994 he was the Speaker of the Johore State Legislative Assembly and member of that Assembly. Kg. Baru Plentong Tengah which is situated within the 407 claimed lots is part of the constituency of Tiram in respect of which he F has been elected as a member of the State Legislative Assembly. According to DW5 sometime in July or August 1994 there was a meeting arranged for Oakfield to hold discussions with the appellants. Present during the discussions was the Member of Parliament for Tebrau. DW5 agreed that the meeting was G convened on his initiative and was chaired by him. Also present at that meeting was J. Singh apparently representing Oakfield. DW5 agreed that the meeting was convened for the purposes of solving a problem. The very pertinent aspect of the evidence of SD5 was when he stated this:

H

Dalam perbincangan itu pihak Syarikat bersetuju supaya lot-lot tanah yang diduduki oleh penduduk dijual dengan harga pada ketika itu RM5.00 satu kaki persegi yang berjumlah lebih kurang RM30,000.00 atau RM32,000.00. Dan juga diputuskan siapa yang bersetuju membeli hendaklah membayar wang sebanyak I RM3,000.00 sebagai wang minat dan bersetuju untuk membeli.

[25] It was also in the evidence of DW5 that there were no specific counsels in attendance during the discussion and the "deal", if any, was with the said J. Singh. DW5 also stated in cross examination that the object of the meeting was to seek a solution. According to DW5 after the meeting the matter was dealt by Oakfield and the claimants. There were also forms which were circulated to the claimants but DW5 was not able to explain the contents of the form.

[26] The evidence of DW7 exemplified the situation thereafter in that payments of RM3,000 were made by several claimants. A receipt was issued (RR p. 556) and it showed that the receipt was issued by J. Singh of J. Singh & Co. Advocates & Solicitors. This exhibit showed that the sum of dollars three thousand was stated as "being payment of see over leaf".

[27] From the evidence the standard proforma endorsed on the reverse of the receipt (or overleaf) is as follows:

> Deposit payment is received pursuant to application no. _____ offer to purchase approximately 6,000 sq feet of land from Oakfield Enterprises Sdn. Bhd. in Plentong land formerly known as lot 83 grant 72. Payment received is subject to survey of the land and subject Oakfield thereafter accepting the offer to purchase.

[28] The words that are to be considered are "deposit payment", "offer to purchase", "payment received is subject to survey" and "subject Oakfield thereafter accepting the offer".

[29] All the above evidence were offered to establish purported agreements that the plaintiff was supposedly to have taken notice of since the respondent, as the purchaser of the 407 claimed lots, had to deal with the same J. Singh **after the alleged agreements had been concluded between Oakfield on the one hand and the appellants on the other.** (emphasis added).

[30] On the evidence it was found that what had transpired as supported by the evidence of DW5 were the following:

(i) the parties were engaged in discussions or even negotiations

(ii) there were oral statements made by J. Singh

(iii) Oakfield was represented by J. Singh

(iv) the three groups of appellants relied on the payment and the receipts and they preferred to have no knowledge of the contents of the words.

[31] However it was evident that the appellants' case was that they had acted on the mistaken belief as to the intent of the receipts. Even if there was a general description in the receipt of an approximate size of the land to be purchased, the completion of a contract was predicated on certain steps being taken including survey and acceptance of an offer. The appellants in fact relied on the belief that having occupied the land at some length and acted on the belief that upon payment of Ringgit 3,000 there were some agreements that had been arrived at. The receipts refer to an offer by the purchaser. The situation necessitates a reiteration of the observation of Edgar Joseph Jr SCJ (as he then was) in *Ayer Hitam Tin Dredging Malaysia Bhd. v. YC Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133:

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v. Alexander* at pp 288, 289 where the court said this:
>
> > It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.
>
> In *Branca v. Cobarro*, the agreement entered into by the parties contained a clause as follows: 'This is a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed.' It was held by the Court of Appeal that a binding agreement had come into effect.

> But it is now well settled that when an agreement is made 'subject to contract' (see *Rossdale v. Denny*) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged".

[32] It would appear that while at the initial stages the appellants have the assistance of persons, for example, like DW5, it is rather strange that they should prefer to have ignored the contents of the receipt. The explanation of not comprehending the contents of the receipts does not add weight to their evidence.

[33] In its totality while the appellants assert that an agreements had been concluded with Oakfield in effect there was no such agreement as it was still subject to contract.

[34] The relationship that the appellants are insisting upon to have given rise to the equitable remedy in the form of a proprietary estoppel whereby binding agreements are said to have been created, therefore remains as an alleged contract with Oakfield through J. Singh who may have appeared as an alter ego of Oakfield. However, as mentioned above, although the evidence of the witnesses for the appellants claimed that there was a belief that an arrangement had been attained, there was yet no certainty or precision as what it was that was purportedly purchased as the alleged arrangement was to be concluded not with a few persons but a large group of persons in respect of different pieces of land. In any event their lack of comprehension of what was endorsed on the reverse of the receipts could not in the circumstances of this case be a justification for the appellants to assume that J. Singh had agreed to certain material particulars. In this respect the circumstances in this appeal are distinguishable from the facts of *Cheng Hang Guan*'s case where the plaintiffs there were in possession of certain lands as tenants who had paid rents and had worked on the land claimed as farmers.

[35] With regard to the alleged conduct of J. Singh or the respondents permitting the appellants to continue to remain in possession, the appellants have not succeeded in controverting the evidence that the appellants started occupying the land as squatters and the construction of buildings as homes were not acts which were encouraged by Oakfield or the respondent as successor in title. The extended occupation could not in the circumstances give rise to any legitimate expectation for it remained

A equally uncontroverted (except for a bare denial) that there was a court order dated 8 November 1989 where the defendants (namely the present appellants) were there also referred to as the "occupiers of land formerly known as Lot 83, Grant No. 72 ...". The plaintiff then was Oakfield and had obtained a court order for
B vacant possession against the persons occupying the lands. The fact that Oakfield was not able to evict the appellants physically when the appellants had continued to occupy the claimed lots in defiance of a court order cannot constitute acquiesence or passive conduct on the part of Oakfield for the appellants had acted in
C the belief that an interest in the land had been acquired where there was none.

[36] In *The Amalgamated Investment & Property Co. Ltd (in liquidation) v. Texas Commercial International Bank Ltd* [1982] 10B
D 84 (at 103 d-g) the term proprietary estoppel has been described as 'an amalgam of doubtful utility'. In this case the appellants have not fully ventilated their reliance on this aspect of the claim but assert that the appellants have acted to their detriment in reliance on a belief that they had legal right over the claimed lands or that
E they would be granted rights. In this appeal the appellants are attempting to show that they were mistaken in thinking that the receipts would operate to confer rights without understanding the endorsements on the reverse and thereby giving rise to an expectation that through the actions of J. Singh there was an
F expectation that rights to the claimed lot will be granted. Further the appellants assert that their belief was acquiesced in or encouraged by the property owner, in this case, Oakfield. Implicit in the arguments of the learned counsel for the group of six appellants is that an estoppel has arisen as against Oakfield. The
G further issue here however is whether the conduct of the respondent being a transferee of the claimed lots itself gives rise to an estoppel.

[37] The evidence does not indicate that there is any
H representation made by the respondent that could be said to have induced the appellants to remain on the claimed lots. If the appellants were to contend that there was a mistaken belief of an equitable interest being acquired to cause the formation of a contract then definitely the element of consensus *ad idem* is missing
I in the alleged formation of the contract. The representation if any could only be attributed to J. Singh as the respondent was not party to the alleged arrangements.

[38] Since the equitable relief sought for could not come to the aid of the appellants there arises a need to consider whether, as contended by the learned counsel for the group of six appellants, reliance could still be made on s. 206(3) of the NLC 1965. The registered title is in the hands of the respondents. The appellants' reliance on s. 206(3) is to be viewed together with the counter claim that was also dismissed by the learned trial judge where the relief sought was for specific performance.

[39] As stated above the reliance on proprietary estoppel was an endeavour to show that an equitable interest in the claimed lots had been attained. In essence the specific relief that is claimed is also to cause a metamorphosis to take place to characterise the non-registered equitable interest into a registable interest. However the object of s. 206(3) is to preserve contractual rights and it was observed in *Kimlim Housing Development Sdn Bhd v. Bank Bumputra Malaysia Bhd & Ors* [1997] 3 CLJ 274 per Edgar Joseph Jr FCJ:

> In our view, s. 206(3) of the Code contains an express provision which states that the provisions of the Code requiring a dealing to be effected in the statutorily prescribed manner shall not '... affect the contractual operation of any transaction relating to alienated land or any interest therein'. This provides statutory authority for the liberal application of equity whenever there is a basis for that (see, eg *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 2 MLJ 105; *Mercantile Bank Ltd v. Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196; *Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; *Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 at p 459 and *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 353 at p 405).
>
> **However, it is a condition precedent for** the application of s. 206(3) that there is in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract. (emphasis added)

[40] The appellants in this case have failed to sustain their contention on the alleged existence of a contractual arrangement with Oakfield based not on actual written agreements but on an equitable relief premised on unconscionability. Even then it is still necessary to state that in effect the appellants are seeking a right *in personam* only by insisting that a contractual right has been maintained under s. 206(3) NLC 1965. The position here could

A be summed up in the words of Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p. 463:

> ... the court is entitled to exercise jurisdiction *in personam* to insist upon proper conduct in accordance with equitable principles and norms (see *Wilkins & Ors. v. Kannammal; Registrar of Titles, Johore v. Temenggong Securities Ltd; and Oh Hiam & Ors. v. Tham Kong*).
>
> The exercise of jurisdiction *in personam* should be distinguished with the exercise of jurisdiction *in rem.* It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *in personam*, ie, he acquires the right to the land as against the vendor personally but not good against the whole world. However, upon registration in accordance with the Code in his name, the vendor acquires a right *in rem*, ie, a real right good against the world as a whole *(Bachan Singh v. Mahinder Kaur & Ors.)*. Prior to registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee. As soon as the transfer of title is registered in his name, the estate or interest of the transferor as set forth in the instrument with all rights, powers and privileges thereto pass to the purchaser (transferee). In order to protect such equitable interest or estate, prior to the registration of transfer, a caveat may be lodged with the Registrar, and so long as it remains without being removed, it imposes restrictions on the entry in the register of dealings in land *(Bachan Singh v. Mahinder Kaur & Ors.; Abigail v. Lapin)*. If the vendor commits a breach of the agreement by refusing to transfer the land to the purchaser, the latter may file a suit for specific performance of the agreement.
>
> The sum total of the authorities cited may be summarized as follows:
>
> (a) Where there is in the existence a right *in personam* or an equitable right prior to the registration of title to the land, the equitable principles of remedies may be applied.

(b) However, upon registration of the transfer of the said land to the purchaser who thereby obtains a right *in rem* or a real right in the property, the express provisions of the Code will apply to the exclusion of equitable principles.

[41] Therefore on the first issue the appellants have not succeeded in asserting an *in personam* equity (estoppel) to create the formation of a binding obligation coupled with a right to equitable relief (specific performance) in their attempt to elevate the equity into an equitable interest culminating in a proprietary relief against the land.

The Second Issue

[42] The learned counsel for the Group III of the appellants has also referred to s. 340 NLC 1965 the relevant parts of which are the following:

340. Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible –

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) –

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

A (b) any interest subsequently granted thereout shall beliable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for
B valuable consideration, or by any person or body claiming through or under such a purchaser.

[43] The claims made by the appellants here are to render defeasible a registered title held by the respondent. Section 340(2)
C provides the circumstances in which "the title ... shall not be indefeasible" and one of the three circumstances is found in para. (a). The protection afforded under this section has been addressed in *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 at p. 54:

D
> The doctrine carried in section 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not
E be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired.

[44] A title that is rendered defeasible is liable to be set aside
F (sub-section 3). However sub-section (3) includes the proviso with regard to the purchaser in good faith and for valuable consideration.

[45] The challenge here is not that the title passed to the
G respondent is in itself defective. The challenge here is the alleged inability of the respondent to meet the requirements of the *bone fide* purchaser and for valuable consideration.

[46] The learned counsel for Group III of the appellants alleged
H the following in support of the submission that the respondent was not a *bone fide* purchaser for valuable consideration of the 407 claimed lots:

(1) The respondent had purchased the claimed lots from Oakfield without vacant possession and on an "as is where is" basis
I with full knowledge of occupiers on the said lots from Oakfield who has not at any time taken possession of the land.

(2) The respondent being an experienced developer ought to have diligently inquired from the appellants of their rights over the said land.

(3) The respondent had purchased the claimed lots at an unreasonable price.

[47] Learned counsel for the appellants in referring to the agreement had not referred to para (3) and (6) of the recital to the agreement other than para (4) which for convenience are reproduced as follows:

> (3) There are no Restrictions-in-Interest endorsed on the titles to the said Land;
>
> (4) The Purchaser has been made aware that there are illegal occupants on the said Land and that the said Land is sold on an "as is where is" basis;
>
> (5) ...;
>
> (6) The Vendor has agreed to sell and the Purchaser has agreed to purchase the said Land free from any encumbrances on the titles to the said Land but without vacant possession and subject to the Express Conditions and as well as implied affecting the said Land at the price and upon the terms and conditions hereinafter appearing.

[48] The combined effect of the aforementioned paragraphs indicate that at the time the agreement was concluded it was made known to the respondent that there were no restrictions in interest endorsed on the title and there were no encumbrances on the title. With regard to the presence of the "illegal occupants", in the absence of the grounds of judgement of the learned trial judge, it is appropriate to address the evidence of PW1. PW1 had given an explanation in evidence in chief as well as through cross examination. It was explained that there was knowledge of the presence of illegal occupants on the claimed lots. Various actions including efforts to remove them physically had stalled, not because those occupants had been able at that stage to establish their interests in the land but only because court orders for vacant possession by Oakfield had not been executed partly due to the failure of precise identification of certain illegal occupants.

[49] There was also the factor that there was a protracted litigation in that an action under O. 89 of the Rules of the High Court 1980 was not granted to the respondent on the ground that there were triable issues and hence an application under O. 89 was not appropriate.

[50] With regard to the price of the land PW1 had given the explanation that it was agreed upon on the basis that since there were illegal occupants the claimed lots could not have fetched a higher price. The evidence of the valuer (SD6) only suggested that the purchase price of the 407 claimed lots should have been higher but his evidence also suggested that the presence of trespassers or illegal occupiers could contribute towards a lower price. His evidence remained an opinion. The court would not be in a position to draw any inference on the price that was agreed upon between Oakfield and the respondent.

[51] Counsels for the appellants have alleged that the respondent was not a *bone fide* purchaser premised on the argument that the respondent had notice of an alleged transaction between J. Singh for Oakfield on the one part and the appellants on the other. There was also an additional allegation of fraud, which according to learned counsel for the respondent, has not been adequately particularised. The alleged defence states *inter alia* "23(i) Seterusnya defendan-defendan mengatakan bahawa plaintif adalah privy kepada suatu fraud dan/atau salah nyata di atas mana tuntutan plaintif ke atas tanah tersebut boleh ditolak".

[52] The other paragraphs referred to in para 23(i)(e) and 23(e)(b) of the amended statement of defence refer to the knowledge of the presence of the occupants and of their alleged refusal to vacate the land and that the plaintiff did not make any reasonable effort to identify the actual interest of the occupants prior to concluding the agreement with Oakfield on an "as is where is" basis.

[53] The learned counsel for Group II of the appellants appeared to have conceded that the onus is on the appellants to establish a case under s. 340(2)(a) which he had described as a "heavy one" and *Saminathan v. Pappa* [1981] 1 MLJ 121, was cited in which Suffian LP (as he then was) had said *inter alia*, in relation to that section:

> As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt: see the Privy Council case of *Narayanan*.

[54] This point was affirmed by the Privy Council on appeal. This same legal issue was also reiterated in the Federal Court decision of *Yong Tim v. Hoo Kok Cheng & Anor* [2005] 3 CLJ 229 in the judgement of the court delivered by Steve Shim CJ (Sabah & Sarawak).

[55] The next issue asserted by learned counsels for all the three groups of appellants was that the respondent must have had notice that the appellants had continued to occupy the claimed lots and that it should have been more vigilant in making further inquiries. This contention appears to impute that having taken notice of the continued presence of the illegal occupiers the respondent is therefore by inference taken to have knowledge of their reasons for continuing to stay there, having had the agreement being concluded with the same J. Singh. The existence of notice or knowledge may be taken into account for purposes of assessing what constitutes good faith. However in this case the court is being asked to infer that the knowledge to be imputed to the respondent is in effect not merely knowledge of the continued presence of illegal occupiers of the claimed lots but also knowledge of the existence of a concluded bargain induced by J. Singh but which has been allegedly reneged. It is noteworthy that this is the basis upon which that fraud is being alleged. The learned counsel for the respondent has cited *Lee Wai Fay & Anor v. Lee Seng Ein* [2005] 3 CLJ 397. The Court of Appeal in that case had made an extensive analysis on the question of allegations of fraud and in fact a claim under s. 340(2)(e) NLC 1965 itself. After having considered *Saminathan*'s case *(supra)* Mokhtar Sidin JCA in referring to that case observed:

> The above case made it clear that the fraud constituted should be by the new registered owner and not by anyone else.

[56] There is an attempt by the appellants here to assimilate knowledge of the continued presence of the illegal occupiers with some form of notice of their claim of a contract which remains in status as something *in personam*. It is noted here that even assuming for a moment that the caveat lodged by the Group III of the appellants constitutes notice (which is not the case in this appeal) there is still the question what is it that the respondent is supposedly to have notice of. There are only suggestions of

constructive notice because of having dealt with J. Singh and again and an assertion that since the selling price could have been higher it could therefore be inferred that there was an intention to cause a fraudulent transfer. In *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 Edgar Joseph Jr J (as he then was) observed intention *inter alia*:

> It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

[57] Learned counsel for Group II of the appellants has cited *Assets Co. Ltd v. Mere Roihi & Ors* [1905] AC 176 where statements therein made by Lord Lindley are said to be in support of the contention of the appellants. Emphasis was laid on the following:

> But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

[58] This emphasis on suspicions however is somewhat misplaced for the same learned counsel has also pointed out in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 and (what was said by Edgar Joseph Jr FCJ) did not support his contention which was as follows:

> The Privy Counsil case of *Assets Co. Ltd v. Mere Roihi & Ors* [1905] AC 176 (per Lord Lindley) is generally accepted in all Torrens jurisdictions as correctly laying down the definition of fraud, namely that the word means "actual fraud or dishonesty of some sort, not what is called constructive or equitable fraud".

[59] This very same approach has also been applied in *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 per Mokhtar Sidin JCA (as he than was) at p. 666:

> The privy Council in *Assets Co. Ltd. v. Mere Roihi & Ors.* [1905] AC 176 held that 'fraud' in the Torrens System means 'actual fraud'. It was later held by the Privy Council in the leading and frequently cited case of *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1926] AC 101 that knowledge of pending

litigation and adverse claim did not amount to fraud. These two cases were applied by the Federal Court in *Datuk Jaginder Singh & Ors. v. Tara Rajaratnam* [1983] 2 MLJ 196, where Lee Hun Hoe CJ (Borneo) said at p. 200:

> ... However, the Privy Council has made clear in *Assets Company Ltd. v. Mere Roihi & Ors.* that "fraud" in the Torrens system means "actual fraud" and not "constructive or equitable fraud". ...

At p. 201 his Lordship said:

> ... In a subsequent case of *Waimiha Sawmilling Company Ltd. v. Waione Timber Company Ltd.* the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his trasferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud.

In *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) held that fraud must be actual, not constructive or equitable. The learned judge at p. 85 said:

> As we stated earlier, the essential question that must be determined is whether the appellant was a party or privy to any fraud the chargor was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving "dishonesty – a wilful and conscious disregard and violation of the right of other persons. *(Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited)*.

[60] In the present appeal the respondent's witness PW1 has stated in evidence that the receipts only surfaced at the time the action was instituted against the appellants. The sale and purchase agreement between Oakfield and the respondent was concluded after the alleged bargain was struck between Oakfield and the appellants as a group. Apart from assertions of suspicions the appellants had failed to establish that the transfer to the respondent was fraudulent other than the fact that J. Singh himself may have in fact cheated the appellants by absconding with the deposits or "wang pendahuluan." But in the circumstances of the case there were others who appeared to have disappeared

with amounts paid by Group I of the appellants. Even after the O. 89 proceedings were instituted the appellants' actions themselves were not timeous and specific performance was filed only as a counter claim, being matters which should have been lodged against J. Singh. With regard to the caveat filed by the Group III appellants it would suffice to apply the statement of Syed Agil Barakbah J at p. 129 in *Damodaran v. Vesudeva* [1974] 1 MLJ 128 as follows:

> It is a unilateral act and no person can create rights in his own favour nor enlarge or add to his existing proprietary rights by means of a caveat.

[61] The caveat filed in this case cannot constitute notice. It was more in the nature of an afterthought. The claims by the appellants here, if any, remain a claim *in personam*.

[62] This brings the appeal to a final issue which was also emphasised by all learned counsels for the three groups of appellants. It is asserted here that J. Singh should have been brought forth as a witness for the respondent and the alleged failure should attract the application of s. 114(g) Evidence Act 1950. It has been contended that the respondents' case during the trial at High Court level had made references to PW1's reliance on discussions with J. Singh, the most significant of which relate to the alleged assurance that the appellants being merely squatters could be evicted. Once again the court has to countenance competing oral evidence on the bargain that is alleged to be arrived at by the appellants with J. Singh bearing in mind that the respondent was not even then privy to the discussion at that time and the witness whom the appellants claim as their independent witness gave evidence that he himself did not follow the events after the alleged discussions with J. Singh. The documentary evidence in the form of the receipts did not support the case for the appellants.

[63] The court is urged to accept the contention that the evidence of PW1 being the sole witness for the case of the respondent is questionable and unreliable. It is said that the respondent should have produced J. Singh as a witness to prove that the appellants were indeed squatters. Learned counsel for Group III of the appellants however did admit that PW1 did not have a personal knowledge of the facts leading to the alleged sale

of land by Oakfield in 1994 to the appellants. It was submitted that the appellants having produced witnesses having a personal knowledge of the facts have therefore proven the existence of the alleged agreements on the balance of probability.

[64] The court in this appeal has therefore to consider the probative value of the evidence (see *Johara Bi bt Abdul Kadir Marican v. Lawrence Lam Kwok Fon & Anor* [1981] 1 MLJ 139). It is also to be noted here that the best available evidence should have been documents. In this case the court orders obtained and the numerous receipts militate against the existence of a consensus *ad idem*. The argument presented by the appellants appear to be circuitous in that if PW1 did not have personal knowledge of the facts but had explained the reasons for which the appellants had continued to remain in occupation as illegal occupants, the onus is no longer on the respondent to establish that there was no contract since it is the appellant's case that an ingress should be made to the legal title of the respondent who had completed another agreement with Oakfield by the payment of the purchase price. It is not the respondent's case that the appellants are not occupying the land illegally. In the absence of a gap in the plaintiff's case it was not a case where s. 114(g) should be invoked.

[65] Even if what is suggested here is constructive fraud the appellants have failed to provide evidence beyond reasonable doubt which they are bound to do.

[66] The appellants have therefore not succeeded in establishing the fraud or fraudulent misrepresentation to render the legal title of the respondent defeasible.

[67] For the reasons given above the three appeals were dismissed with costs. The entire decision of the trial judge on the respondent's case and the decision to dismiss the counter claim lodged by the appellants were affirmed.